IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2305 OF 2005 .

M/s Sheetal Enterprises. .. Petitioner.

V/s.

Union of India & ors. .. Respondent.

Shri V.A.Sonpal for the petitioner.

Shri A.J. Rana with P.S. Jetly for the respondents.

CORAM : V.C.DAGA AND J.P. DEVADHAR, JJ.

DATED : 13.10.2005.

ORAL JUDGMENT (Per V.C.Daga,J.)

1. The question which arises in this case is whether the Commissioner of Central Excise (Appeals) has a power to condone delay beyond 60 days.

The Facts:

2. The facts giving rise to the present petition in nutshell are as under:

. The petitioner is a manufacturer of industrial lubricants, availing benefit of Nil rate of effective duty for export under Rule 13 and Rule 14 of the Central Excise (No.2) Rules, 2001 ('the Rules') framed under Central Excise Act, 1944 ('the Act')Against the export obligation for the goods intended to be cleared for the export he was

supposed to file the proof having exported the goods within 180 days from the date of export.

3. The petitioner claims to have cleared five consignments for export but has neither submitted the proof of export within prescribed period of 180 days of export nor could he submit the same during the pendency of the adjudication proceeding, which culminated in orders in Original dated 20.1.2002 and dated 28.3.2003, served on the petitioner on 2.1.2003 and 31.3.2003 respectively.

4. The petitioner, for the reasons stated in the petition, details of which are not necessary, could not file appeals against the aforesaid orders before the Commissioner of Central Appeals (Appeals) (the Appellate Authority) within a stipulated period of 30 days. The delayed appeals were filed. In one of the appeals, there was a delay of about 202 days; whereas in another appeal; there was delay of about 194 days. The Appellate Authority not being empowered to condone delay beyond the period of 30 days, excluding the period prescribed for filing appeal, refused to condone delay vide its order dated 30th January, 2004.

5. Not being satisfied with the aforesaid order refusing to condone delay, petitioner carried

revision application to the Government of India and the said revision application also came to be rejected with the result revisional authority upheld the order of the Appellate Authority refusing to condone delay beyond the period of 30 days.

6. Being aggrieved by the aforesaid order of the Government of India, the petitioner invoked writ jurisdiction of this Court under Article 226 of the Constitution of India. Petitioner has given details in the petition explaining various difficulties faced by it for not preferring appeals within the prescribed period of limitation. Petitioner also produced certain documentary evidence to explain delay caused in filing appeals.

7. However, petitioner could not submit proof of export in original within prescribed period to the respective authorities and suffered adverse orders. Petitioner did not file appeals against the said orders before the Appellate Authority within the stipulated period of 30 days but filed delayed appeal one after 282 days and another after 194 days, contending that the orders were served on them on 2.12.2003. The appellate authority not being empowered to condone delay beyond 30 days from the date of export, rejected these appeals.

8. On being noticed, the respondents appeared and filed their counter affidavits and opposed the reliefs claimed in the petition.

. With the aforesaid rival pleadings on record, the petition was heard for admission.

9. Learned Counsel appearing for the petitioner submitted that though appeals preferred by the petitioner under section 35 of the Central Excise Act ('the Act' for short) were barred by limitation, still, prayer for condonation of delay could not have been rejected by the 1st Appellate Authority. He contends that the impugned orders passed by the first Appellate Authority refusing to condone delay for the lack of power are devoid of any merits and are liable to be set aside. In support of this contention learned Counsel for the petitioner relied upon judgment of this Court in the case of **Union of India vs. Popular Construction Co. (2001) 8 SCC 470**. He tried to draw support from this case to contend that power to condone delay exist in favour of the Appellate Authority in absence of the words "but not thereafter" at the end of the proviso to section 35 of the Act. He thus submits, we should read power in favour of the Appellate Authority to condone delay.

10. Alternatively, learned Counsel for the petitioner sought to contend that looking to the powers of this Court under Article 226 of the Constitution, this Court can condone delay in filing appeal in exercise of its writ jurisdiction. He thus submits that considering the peculiar facts of the case delay should be condoned and appeal should be remitted back to the first Appellate Authority for consideration on merits. He placed reliance on the judgment of the Supreme Court in the case of **Union of India vs. Kirloskar Pneumatic Company 1996 (84)ELT 401 (SC).**

10. On the other hand, Shri Rana, learned senior Counsel appearing for thee Revenue, opposed the contentions of the petitioner. He submits that there is no power to condone delay with the first appellate Authority beyond the prescribed prescribed. He submis, there is no justification in reading powers in favour of the authorities under the Act. He further submits that there is no justificaton in indirectly seeking application of provisions of the Limitation Act to such power of condonation of delay.

THE ISSUE:

11. The issue that falls for consideration is whether the authorities discharging duties under the

Act has power to condone delay beyond the period of limitation prescribed under the Act and, whether provisions of the Limitation Act would apply to the proceedings under the provisions of the Central Excise Act.

STATUTORY PROVISION:

12. Before proceeding to consider the issue, it would be appropriate to refer to relevant provisions of section 35 of the Act which reads as under:

> . "Appeals to Collector (Appeals)-
>
> . (1) Any person aggrieved by any decision or order passed under this Act by a Central Excise Officer lower in rank than a Collector of Central Excise may appeal to the Collector of Central Excise (Appeals) (hereinafter in this Chapter referred to as the Collector(Appeals) within three months from the date of the communication to him of such decision or order.
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> . Provided that the C (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months, allow it to be presented within a further period of three months.

CONSIDETATION:

13. Having heard rival parties, we must observe that in Popular Construction Company's case (cited supra), the apex Court had an occasion to consider the applicability of the provisions of Limitation

Act, 1996. In this case, the arbitrator passed an award on August 29,1998, under the impression that the Arbitration Act, 1940 applies. The Arbitrator forwarded the original award to the appellants with a request to file the award in the High Court of Bombay so that a decree could be passed in terms of the award under the provisions of the Arbitration Act, 1940. The award was accordingly filed by the appellants before the Bombay High Court on March 29, 1999. The appellant filed an application on April 19, 1999 challenging the award under section 30 read with section 16 of the Arbitration, 1940. Subsequently, the application was amended by inserting the words " Arbitratiion and Conciliation Act,1996" in the place of " Arbitration Act, 1940". The said application was dismissed by the learned Single Judge on October 26, 1999 on the ground that it was barred by limitation under section 34 of the 1996 Act. The division Bench rejected the appeal and upheld the findings of the learned Single Judge. In the appeal before the apex Court it was contended that section 29(2) of the Limitation Act makes the provisions of section 5 of the Limitation Act applicable to the special laws like 1996 Act, since 1996 Act itself did not expressly exclude its applicability and that there was sufficient cause for the delay in filing the application under section 34. The said contention was opposed by the

respondents contending that section 34 plainly and expressly excluded the operation of section 5 of the Limitation Act. The apex Court after considering the scope of section 29(2) and the applicability of the provisions contained in sections 4 to 24 of the Limitation Act, and after reviewing the case law, concluded that the history and scheme of 1996 Act supports the conclusion that the time-limit prescribed under section 34 to challenge the award is absolute and unextendable by the court under section 5 of the Limitation Act. The Court after referring to the Arbitration and Conciliation Bill, 1995, which preceded the 1996 Act, noted that one of its main objectives was the need to minimise the supervisory role of courts in the arbitral process. The apex Court also referred to the term "expression exclusion" which may follow from the scheme and object of the special or local law by referring to the following observations in the case of Hukumdev Yadav vs. Lalit Narain Mishra (1974) 2 SCC 133:

> . Even in a case where special law does not exclude the provisions of sections 4 to 24 of the Limitation Act, by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation.

14. The apex Court also noted the specific words

contained a proviso to section 34(3), which provided that an application contemplated under the provisions be made within the period of three months, which may be entertained within a further period of thirty days "but not thereafter". Therefore, both on the wording of the said provision as well as taking into account the scheme of the Act, the apex Court held that the provisions of section 29(2) and consequently sections 4 to 24 of the Limitation Act are not applicable to the proceedings under the 1996 Act."

15. So far as applicability of the provisions of Limitation Act in terms of section 29 of the said Act is concerned, a Bench of two learned Judges of the apex Court has reviewed the case law regarding the applicability of the provisions of the Limitation Act in terms of section 29(2) of the Act in Gopal Sardar v. Karuna Sardar (2004) 4SCC 252 with reference to the West Bengal Land Reforms Act, 1955. The issue was whether the limitation prescribed under section 8 for making an application gets enlarged by virtue of the application of the provisions of the Limitation Act. The Court reviewed all its earlier decisions starting from Kaushalya Ranivs. Gopal Singh AIR 1964 SC 260 and concluded as under:

. "Considering the scheme of the Act being a self-contained code in dealing with the matters arising under section 8 of the Act and in the light of the aforementioned decisions of this Court in the case of Hukumdev Narain Yadav (1974) 2 SCC 133, Anwari Basavaraj Patil (1993), 1 SCC 636 and Parson Tools (1975) 35 STC 413 (SC); (1975) 4SCC 22 it should be construed that there has been exclusion of application of section 5 of the Limitation to an application under section 8 of the Act. In view of what is stated above, the non-applicability of section 5 of the Limitation Act to proceedings under section 8 of the Act is certain and sufficiently clear. Section 29(2) of the Limitation Act as to the express exclusion of section 5 of the Limitation Act and the specific period of limitation prescribed under section 8 of the Act without providing for either extension of time or application of section 5 of the Limitation Act or its principles can be read together harmoniously. Such reading does not lead to any absurdity or unworkability of frustrating the object of the Act. At any rate, in the light of three-Judge Bench decision of this Court in Hukumdev Narain Yadav case (1974) 2SCC 133 and subsequently followed in Anwari Basavaraj Patil case (1993) 1 SCC 636 even though special or local law does not state in so many words expressly that section 5 of the Limitation Act is not applicable to the proceedings under those Acts, from the Scheme of the Act and having regard to various provisions such express exclusion could be gathered.."

16. In the case of Kirloskar Penumatic Company (cited supra), the Apex Court was considering the scope of jurisdiction under Articles 226 and 227 of the Constitution of India. The Apex Court ruled that the power conferred by Articles 226/227 is designed to effectuate the law, to enforce the Rule of law and to ensure that the several authorities and organs of the State act in accordance with law.

It cannot be invoked for directing the authorities to act contrary to law. In particular, the customs authorities, who are the creatures of the Customs Act, cannot be directed to ignore or act contrary to section 27, whether before or after amendment. May be the High Court or a Civil Court is not bound by the said provisions but authorities under the Act are. Nor can there be any question of the High Court clothing the authorities with its powers under Article 226 or the power of a civil Court. No such delegation or conferment can ever be conceived.

17. In case of Ion Exchange India Ltd. (2000) 117 STC 436 (SC) the apex Court was considering the scope of section 24(7) of the Orissa Sales Tax Act, 1947m as per which the amount due in accordance with the order of the Tribunal shall not be stayed pending disposal of any application or reference. However, it was held that such provision cannot be a bar to the exercise of jurisdiction of the High Court under Article 226 of the Constitution of India. But, at the same time, the apex Court agreed that while exercising the power under Article 226 of the Constitution of India, the High Court should keep in mind the legislative intention indicated by sub-section (7) of section 24 and should respect it. Only in exceptional cases, should the Court interfere and not as a matter of course.

18. If we examine the relevant provisions of the Act, in the light of the decisions referred to earlier, though the provisions of the Act do not contain any express words excluding the applicability of the provisions of the Limitation Act, but it has to be considered in the light of the of the Act. First of all, the Central Excise Act, 1944, is a self-contained code providing remedies for all contingencies that would arise in the administration of the provisions of the said Act, viz. the Act provides to enforce the rights, forum is provided, procedure is prescribed, remedies including appeals and revisions are provided, penalties are indicated for non-compliance of the provisions as well as the orders passed under the provisions of the Act. Further period of limitation is also specifically prescribed for filing of the returns, appeals, revisions etc.

. The submissions made by the learned Counsel for petitioner on both counts are devoid of any substance.

19. This Court in the case of **Navinon Limited vs. Union of India 2005 (1) Bom.C.R. 58,** to which one of us (Devadhar,J.) was a party, had an occasion to consider the identical question as to the

applicability of the Limitation vis-a-v-s power to condone delay. The Division Bench of this Court held that Limitation Act applies only to Courts. Such Court may not necessarily be constituted under Code of Civil Procedure or Code of Criminal Procedure. The forum that functions as Court or has trapping of Courts would be a Court for the purposes of its applicability. This judgment further lays down that the Commissioner of Central Excise has no jurisdiction to condone delay beyond 60 days in filing appeal. If that be so, the condonation of delay was rightly refused by the first appellate authority for want of powers to condone.

20. It is needless to mention that if the order passed by the appellate authority under the Central Excise Act cannot be faulted, then the impugned order cannot be set aside. Maintaining impugned order powers under Article 226 cannot be invoked for condoning delay, simply because it would give rise to two inconsistent orders in the same proceedings which is not permissible in law (see **Dwarkaprasad vs. Harikant Prasad, AIR 1973 SC 655; Mahadev Maruti vs.Shri Ganapati, AIR 173 Bom.119; and Amba Bai vs. Gopal 2001 AIR SCW 1996.** Even otherwise, in our opinion, this is not a fit case to condone delay in exercise of powers under Article 226 of the Constitution of India.

21. Learned Counsel appearing for the petitioner also cited various other judgments to canvas his view point. However, we do not think it necessary to refer to them in view detailed judgment of this Court in the case of Navinon Ltd. (supra), which deals with the same issue based on more or less same submissions.

. In the result, petition is dismissed in limine with no order as to costs.

(J.P. DEVADHAR,J.) **(V.C. DAGA,J.)**